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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 259

S. D. TILNEY, W. C. HAM, ET AL.,
Petitioners,

vs.

CITY OF CHICAGO, A VOLUNTARY MUNICIPAL CORPORATION, AND OTHERS, INDIVIDUALLY AND AS TRUSTEES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Reply for Petitioners.

Respondents admit at pages 15 and 20 of their brief:

"The traction fund is a trust fund in the sense that the monies are to be used only for the purposes prescribed by the (year 1907) franchise ordinances" and "that fund is to be expended for the purposes specified in the ordinance."

Who can be more directly parties to the year 1907 ordinances than your petitioners, who exclusively have paid the overall moneys collected for all purposes whatever under said ordinances. See our petition at page 30.

Respondents *do not answer* the petition. They ignore all that is shown about co-operative economy. They disregard entirely the history behind these ordinances. See our Petition at pages 3 and 14 ff. Respondents evade. They file only a "brief in opposition for certiorari." The substance and the reason and the equity of the record and the petition, stand admitted before this Court.

The personal remarks at page 29 of the "brief in opposition" seeking to impugn the motives of petitioners in this Court, is an attempt to confuse the issues. These personal remarks are a repetition of language by the same respondents in their brief in this court in the case of *Blair* v. *City of Chicago*, 201 U. S. 400. (That ruling by this Court directed the decrees by which the year 1907 ordinances were adopted and confirmed. 136 Tr. ff.) In that case this Court effectually disposed of that same personal language and argument (page 407) by the respondents, and gave judgment against respondents as follows (page 449):

> "As to the conspiracy to get the case into the Federal court, with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents parties having the requisite citizenship and a justiciable demand from seeking the Federal courts for redress, if such be their choice of a forum in which to have contested rights litigated. Having a proper cause of action and the requisite diversity of citizenship confers jurisdiction upon the Federal courts, and in such cases the motive of the creditor in seeking Federal jurisdiction is immaterial. (Citing cases.)
>
> "It is true that the judgments were taken and the receivers appointed on the same day, and it is quite likely that the receiverships were in view when the judgments were taken, and that preparations had been

made in that direction, but we perceive in this no legal objection to the jurisdiction of the court."

Actually what respondents have done is to copy in this Court the substance of their brief in the Court of Appeals. That does not accord with the rules of this Court. Such action by the respondents fails to raise any issue upon the petition. By failure to answer, the respondents admit that they are trustees of the funds brought into court by this record. They admit that they became such trustees by proceedings at the foot of prior decrees in these same federal courts (Tr. 136 ff, petition 56). They challenge the power of this Court just as the officials did in the *City of Dublin* case. And they boldly say that no Court may require them to account. They flout the foremost and primary duty of all trustees.

How completely respondents seek confusion is shown by the complaint (B-13, Tr. 15 and 131); and is illustrated by the parallel situation of a derivative stockholders suit. Here as there *the petitioners are like relators who act to set the machinery of the court in motion, whenever the trustees or the corporation fail to do so for the protection of the fund. Bingham* v. *Ditzler,* 309 Ill. App. 581 and 320 Ill. App. 88, 91, 33 N. E. (2d) 939 and 49 N. E. (2d) 812, 813 is an example. The Court there rules at page 813:

"* * * The minority stockholder institutes the action simply in order to set in motion the judicial proceedings so as to accord to the injured corporation the relief to which it is entitled."

In that case as in the case at bar, the movants were not awarded any direct financial relief. Direct relief to plaintiffs is never a test in a class suit. Financial profit is not the purpose of co-operative economy.

Likewise in the case at bar your petitioners act "to set in motion the judicial proceedings" for the municipaliza-

tion of street railways at Chicago, so that the trust fund may be restored and the trust may be performed. Petitioners insist again (as respondents admit at page 20 of their brief) "that fund is to be expended for the purposes specified in the (year 1907) ordinance:" namely, for the consumer ownership of the street railway system of Chicago. That is the measure of the duties *which the respondents have not performed.* Only the revenue car riders (your petitioners) can ever collect any benefit by enjoying the better transportation service to be provided by that performance of trust. Like the householders in the *City of Dublin* case, your petitioners seek to have these duties performed and enforced.

City of Moline, Town of Aurora and Dublin Cases.

These cases confirm Point A-7 at page 40 of Petition. The respondents carefully omit any discussion of the case of *Town of Aurora* v. *C. B. & Q. Ry. Co.,* 119 Ill. 246. They also ignore *City of Moline* v. *Greene,* 252 Ill. 475 at 480, which is relied upon by our Petition at pages 19 and 52. In that case inhabitants as "cestuis que trustent" (page 480) objected when the City sought to take 10 feet off library grounds to widen the street. The Court said:

> "*As inhabitants* and taxpayers of the city, *for whose use and benefit the library was established* and the title to it held in trust, *they were interested and concerned in the preservation of the property for the purposes to which it was devoted.* In our opinion, the court did not err in entertaining the objections and overruling appellant's motion to strike them." (Page 481.)

The opinion further states:

> "*The library was established by an ordinance* adopted in 1892 in accordance with the provisions of

the statute. The property was purchased for $10,000, and *the money to pay for it was raised by subscription. The deed was made* to the board of directors of the Moline Public Library of Moline, Ill., *and contained no conditions.* A donation of $40,000 was made by Andrew Carnegie for the construction of the building." (Page 477.)

"* * * *The legal title* to the library property is in the library board, but it *is held by them in trust* for the inhabitants of the city; the use of the library and property to be forever free to said inhabitants. *The inhabitants* of the city *are the real parties in interest,* for whose benefit the title is held in trust by the board of directors." (Page 480.)

In the case at bar the year 1907 ordinance trust agreement provides:

"The said City shall *deposit* the amount so paid to the said City *to the credit of a separate fund to be kept and used for the purchase and construction of street railways.*" (Tr. 8 and petition 9 and 26.)

That *City of Moline* case and said *Town of Aurora* case (page 24 of our Petition) in Illinois, and the *City of Dublin* case (1 Bligh N. R. 312) before the House of Lords, are directly in point to sustain the right of your petitioners to be heard at Court as "cestuis que trustent", (page 480), "real parties in interest" (page 480), and persons for whom as former and future (Tr. 2) revenue patrons of street railway service, "the legal title is held in trust" (page 480). These authorities sustain the proposition that your petitioners are directly and exclusively interested and concerned in the matter of Municipalization of Street Railways at Chicago. We are the real parties in interest for the preservation of the fund created expressly and historically for that sole purpose.

The motion by Respondents in the District Court (Tr. 98) to dismiss the complaint admits the truth of the complaint including paragraph A-6 which reads as follows

"Plaintiffs are Sole Beneficial Owners.

A-6) The fares charged and collected in excess of just compensation, for transportation services rendered, were so paid by the plaintiffs who constitute the class of car riders, and were received, were segregated as percentages of totals, and paid over into said car-riders-overcharge-trust-fund to be held in trust by the defendants to this suit, and solely to be applied for the use and benefit of the class of persons, who are revenue car riders at any time. The plaintiffs alone are damaged and may complain, when any question as to safeguarding the custody or application of the car-riders-overcharge-trust-fund does arise for decision" (Tr. 4 and 126).

The general principles of equity and the constitutional basis upon which the petition is founded (Tr. 47 ff and 121 ff and 152) are not questioned by the respondents in their "brief in opposition." The fundamental duty of this Court to make precedent where none exists, whenever basic social grievances of the magnitude herein are shown, is not questioned by the respondents.

Some italics are used in this petition for emphasis.

Discussion of *Barsaloux* case follows as an appendix.

Petitioners ask again that the writ of certiorari be ordered and that this record be reviewed by the Supreme Court.

Respectfully submitted,

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